

Protest of) Date: April 23, 1992
M. ROSS MASSON COMPANY)
Solicitation No. 104230-91-A-0096) P.S. Protest No. 92-14

DECISION

M. Ross Masson Company ("M. Ross Masson") protests the award of a subcontract to Federal Prison Industries, Inc. (which uses the trade name "UNICOR"^{1/}) by American Development Corporation ("ADCOR"), who was awarded a prime contract with the Postal Service to manufacture eastern region mail containers ("ERMCs"). The protester alleges that ADCOR's use of UNICOR as a subcontractor for the manufacture of a portion of its prime contract with the Postal Service will have an adverse effect on its business, and is a violation of federal statutes and ADCOR's contract provisions.

Solicitation No. 104230-91-A-0096 was issued by the Office of Procurement, Headquarters, in Washington, D.C. on May 1, 1991, with an offer due date of May 31. The solicitation sought fixed-price offers for approximately 60,000 ERMCs to be delivered to two different locations. According to the solicitation, award would be made to the offeror whose proposal conformed to the solicitation requirements and provided the lowest total overall cost to the Postal Service.

On July 2, 1991, ADCOR was awarded the contract to manufacture the ERMCs, after receiving an affirmative responsibility determination from the contracting officer, based in part upon its positive preaward survey. M. Ross Masson sent a letter, dated March 9, 1992, to the Assistant Postmaster General of the Procurement and Supply Department requesting that the Postal Service reconsider its decision to contract with ADCOR based upon its subcontract with UNICOR. By letter dated March 11, 1992, M. Ross Masson formally protested to this office, which received the letter on March 12.

The protester, through counsel, initially explains that it had supplied netting for the ERMCs under a subcontract with another prime contractor who had previously won a Postal Service award to make ERMCs. The protester discovered that the current awardee, ADCOR, would be subcontracting its netting requirement to the Colorado

^{1/} UNICOR is a government-owned corporation established to provide employment for the greatest number of those inmates in the United States penal and correctional institutions as is reasonably possible to operate the prison shops in a manner that will not place undue burden of competition from the products of the prison workshops upon any single private industry or free labor. 18 U.S.C. ' 4122(b)(1) (1988).

State Prison UNICOR and believes that this subcontract will have a serious negative financial impact on its company.

M. Ross Masson then asserts that although there is a dearth of case law pertinent to the Postal Service on this issue, it found a case^{1/} that it believes, by analogy, would suggest that ADCOR is not permitted to subcontract with UNICOR in direct competition with a free enterprise company such as M. Ross Masson; especially when the case is read in conjunction with 39 U.S.C. ' 2201.^{1/} Based upon this legal analysis, M. Ross Masson requests that the Postal Service reconsider its decision to contract with ADCOR unless ADCOR agrees not to purchase its materials and supplies from convict labor institutions such as UNICOR.

The contracting officer reports that this protest is untimely, according to Postal Service protest regulations, because it was filed more than fifteen working days after the ADCOR award was made. In addition, he states that a challenge to ADCOR's compliance with the contract's clause prohibiting use of convict labor is not a topic for consideration in a bid protest, relying upon a previous protest decision concerning the same issues.^{1/}

Discussion

We must address the timeliness issue first since "[w]e are without authority to consider a protest which is untimely." American Telephone Distributors, Inc., P.S. Protest No. 87-117, February 23, 1988; Flamenco Airways, Inc., P.S. Protest No. 91-21, May 21, 1991. Procurement Manual ("PM") 4.5.4 d. specifically states that "no protest will be considered if received more than 15 working days after award of the contract in question."

^{2/} The case cited by the protester's counsel is United States v. Davison Fuel & Dock Co., 371 F.2d 705 (4th Cir. 1967). In that case, Davison Fuel was supplying coal to a prime contractor who contracted with a government agency to operate that agency's energy production center. Davison Fuel paid its miners wages below those required by the Walsh-Healey Public Contracts Act and was sued by the United States for violating the Act. Davison Fuel argued that the Act was not applicable to it since its contract was with a private corporation, and therefore, its contract was not a government contract. While the court expressly found that the Walsh-Healey Act is "applicable only to primary government contracts and . . . not . . . subcontract[is]," it noted that the Act was applicable to "substitute manufacturers", defined as a party who produces all or some of the commodities called for by a contract governed by the Walsh-Healey Act.

This definition was contrasted with that of a subcontractor which was defined as a party who makes materials, supplies, articles or equipment used in manufacturing the commodity required by the government contract. The court found that because Davison Fuel met the definition of a substitute manufacturer, it was governed by the Act. An additional factor the court considered in deciding that the Act applied to Davison Fuel was that its contracts with the prime contractor incorporated all the government contract clauses contained in the prime contract. In addition, the government agency's contracting officers were signatories to the second contract, in effect guaranteeing payment by the prime contractor.

^{3/} 39 U.S.C. ' 2201 (1988) states: "Except as provided in [18 U.S.C. ' 412 ~~et seq.~~], the Postal Service may not make a contract for the purchase of equipment or supplies to be manufactured by convict labor." 18 U.S.C. ' 412 et seq. describes Federal Prison Industries ("UNICOR") and its operations.

^{4/} The contracting officer relied upon C.R. Daniels, Inc., P.S. Protest No. 90-62, December 21, 1990.

M. Ross Masson's protest was received by this office on March 12, 1992. That date is more than eight months after the date award was made to ADCOR. Due to its untimeliness, "the protest may not be decided on the merits." Alabama Metal Products, Inc., P.S. Protest No. 91-20, May 7, 1991.

Besides filing an untimely protest, M. Ross Masson has the additional problem of showing that it has standing, as a prospective subcontractor, to raise these issues. The "Procurement Manual (PM) 4.5.2 vests this office with jurisdiction to decide protests where the protester is an 'interested party'. . . . '[I]nterested party' has been interpreted to mean that a party must be eligible for award if its protest were upheld. . . . [A] subcontractor is not an interested party with standing to protest where its financial interest in the relief requested is wholly contingent on factors outside the contract award process. . . ." York International Corporation, P.S. Protest No. 89-77, January 19, 1990.

Here, M. Ross Masson's financial interest in the relief requested (ordering ADCOR not to subcontract with UNICOR) is dependent upon whether ADCOR would decide to give it a subcontract should ADCOR be prohibited from contracting with UNICOR. Such a decision by the awardee is a factor outside the Postal Service award process. Therefore, M. Ross Masson is not an interested party and does not have standing to bring this protest. Since the protester does not have standing and the protest is untimely, it must be dismissed.^{5/}

The protest is dismissed.

William J. Jones
Associate General Counsel
Office of Contracts and Property Law

^{5/} We do note, however, that the case cited by the protester's counsel does not, even by way of analogy, prove that the Postal Service is violating the statute prohibiting it from using convict labor by permitting its prime contractor to use UNICOR as a subcontractor. In fact, the Davison Fuel case bolsters the idea that federal statutes prohibiting prime government contractors from various actions may not be applicable to their subcontractors. The Davison Fuel court specifically found that while the Walsh-Healey Act applied to "substitute manufacturers", it was not applicable to subcontractors.

In addition, although we did not reach the merits of M. Ross Masson's protest here, we refer it to the C.R. Daniels protest, cited in footnote 4, which addresses the same issues raised by the protester in this case.